

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION**

**GERALD CARTER,
PLAINTIFF**

v.

**NORTHSIDE INDEPENDENT
SCHOOL DISTRICT,
DEFENDANT**

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CIVIL ACTION NO. 5:11-cv-492 FB

**APPENDIX:
DEFENDANT'S EVIDENTIARY SUMMARY OF MATERIAL FACTS
IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

1. The following items in this Appendix are incorporated by reference for all purposes into Defendant's Motion for Summary Judgment and Motion for Partial Dismissal and into this Appendix:

Exhibit A: Affidavit of D. Craig Wood, authenticating discovery Exhibit A1

Exhibit A1: Deposition of Gerald Carter

Exhibit B: Affidavit, with attachments, of Lori Shaw, Principal, Mary Michael Elementary School, Northside Independent School District

Exhibit B1: Plaintiff's Two-Year Contract

Exhibit B2: NISD General Employment Notice for Teacher

Exhibit B3: Performance Evaluation dated October 2008

Exhibit B4: Performance Evaluation dated April 13, 2009

**Exhibit B5: Professional Development and Appraisal System
Summative Annual Appraisal dated April 15, 2009**

**Exhibit B6: Email thread between Mr. Carter and Ms. Massiate
dated September 24, 2009**

**Exhibit B7: Chart of 4th grade classrooms test passing rate dated
October 20, 2009**

**Exhibit B8: Chart of 4th grade classrooms test passing rate dated
November 10, 2009**

Exhibit B9: Reprimand dated October 30, 2009

Exhibit B10: Reprimand dated January 14, 2010

- Exhibit B11: Plaintiff's List of Accommodations dated June 18, 2010**
- Exhibit B12: Excerpts of Michael Elementary Employee Handbook Procedures 2010-11**
- Exhibit B13: Chart of each first grade teacher's inputted grades dated October 19, 2010**
- Exhibit B14: Lessons Plans for Week of September 20, 2010**
- Exhibit B15: Team Meeting Agenda and Sign-In Sheet**
- Exhibit B16: Professional Development and Appraisal System Summative Annual Appraisal dated November 4, 2010**
- Exhibit B17: Professional Development and Appraisal System Intervention Plan for Teacher in Need of Assistance dated December 1, 2010**
- Exhibit B18: E-Mail from Ms. Welch to Plaintiff dated January 4, 2011**
- Exhibit B19: Reprimand dated January 4, 2011**
- Exhibit B20: Reprimand dated January 4, 2011**
- Exhibit B21: Notice of Recommendation to Non-renew dated April 8, 2011**
- Exhibit B22: Board Policy DFBB (Legal)**
- Exhibit B23: Board Policy DFBB (Local)**
- Exhibit B24: Plaintiff's Resignation Letter submitted April 21, 2011**
- Exhibit B25: Superintendent's acceptance of resignation dated April 21, 2011**
- Exhibit B26: Board Policy DAA (Legal)**
- Exhibit B27: Board Policy DIA (Legal)**
- Exhibit B28: EEOC Charge dated April 26, 2010**
- Exhibit B29: EEOC Charge Amendment dated June 21, 2010**
- Exhibit B30: EEOC Charge Amendment dated January 10, 2011**

Exhibit C: Affidavit of J. Mark Hardison, Employee Benefits Coordinator, with attachments

- Exhibit C1: Mr. Carter's September 25, 2009 Application for Leave**
- Exhibit C2: Mr. Carter's November 4, 2009 Application for Leave**
- Exhibit C3: November 18, 2009 Medical Certification**
- Exhibit C4: Mr. Carter's January 15, 2010 Application for Leave**
- Exhibit C5: Letter from Mr. Carter dated June 18, 2010 re Accommodations**
- Exhibit C6: Letter dated July 15, 2010 from Mark Hardison to Plaintiff**
- Exhibit C7: February 7, 2011 Fitness for Duty Certificate**

2. The District presently, and at all times relevant to this lawsuit, is and has been an equal opportunity employer, having policies in place that prohibit discrimination and retaliation against any individual on the basis of his or her disability. *See* Exhibits B26 and 27.

3. Mr. Carter was employed in August 2007 as a fourth grade teacher at Mary Burns Michael Elementary School in Northside Independent School District under a two-year employment contract for the 2009-2010 and 2010-2011 school years. *See* Ex. B; B1.

4. Mr. Carter experienced many performance problems as a teacher from as early as October 2008. *See* Ex. B. Often, when his performance problems were discussed with him, he would immediately submit a request for medical leave of absence. *See* Ex. B; C. Over the course of two school years (2009-10 and 2010-11), he was absent for over 60% of the school days, missing approximately 228 work days out of a total of 374 total work days. *See* Ex. C. His leave resulted in his working only two months in the 2009-10 school year and one semester in the 2010-11 school year. *Id.* His most recent Fitness for Duty report from his physician indicated that Plaintiff's leave was for an "indefinite" duration. *See* Ex. C.

5. The classroom teacher's job description sets out a teacher's job requirements, including the requirement to develop and implement lesson plans, prepare lessons that "reflect accommodations for differences in student learning styles," work cooperatively with administrators and team leaders, manage student behavior, and maintain open communication with parents, students, principals and teachers. *See* Ex. B; B2. Additionally, the teacher job description requires that teachers maintain "emotional control under stress." *Id.*

6. Ms. Shaw required all teachers on her campus to turn in their lesson plans for the following week, in writing, by the end of the day on Friday. *See* Ex. B. She required this for several reasons. *Id.* It allowed her and other administrators an opportunity to review the lesson

plans before they were implemented. *Id.* Additionally, it ensured that the lesson plans would be available for a substitute teacher in the event that a teacher becomes ill over the weekend, and also for the special education teachers to have time to prepare any modifications that may be necessary for any particular students who were served in a teacher's classroom. *Id.* Many principals in the District require that lesson plans be turned in on Friday, and a few even require them to be turned in on Wednesday or Thursday due to the special education modification issue. *Id.* Ms. Shaw informed the teachers on her campus of the lesson plan deadlines at the beginning of the school year and provided them with a schedule that contained the deadlines on which to submit the completed lesson plans. *Id.* Additionally, Ms. Shaw required the grade level leaders to remind their team of the deadlines. *Id.* Also, the Employee Handbook, which is given to each employee at the campus, reminded teachers of the importance of entering grades weekly and to have several graded assignments per subject per student, as well as reminded teachers of the requirements to complete and submit their weekly lesson plans. *See* Ex. B; B12.

7. Before the school year began and throughout the school year, Ms. Shaw informed all of the teachers that student grades were required to be inputted on the computer weekly so that parents are able to keep track of their child's grades online. *Id.*; *see* Ex. A1 (Plaintiff's deposition) at 74:25, 75:1-5, 76:1-9. Additionally, she reminded the teachers that they should have approximately two to three grades per subject per week for all students. *See* Ex. B; Ex. A1 at 75:19-25. It was not sufficient to have grades written down, but not inputted on the computer, because the District permits parents to view grades online and the parents cannot see the grades if they are merely written down and not online. *Id.*

8. In the 2008-09 school year, Mr. Carter routinely failed to timely submit completed lesson plans, did not timely complete attendance records for his class, missed several

deadlines, admitted to Ms. Shaw that he did not know which students in his class were failing, and admitted that he was not sure which of his students might need more academic assistance. *See* Ex. B. Additionally, Mr. Carter admitted at his deposition that he understood that lesson plans needed to be turned in, and that he realized that it was not acceptable to turn them in late. Ex. A1 at 52:19-23.

9. Ms. Shaw evaluated Plaintiff in October 2008. *See* Ex. B; B3. In her October 2008 evaluation of Mr. Carter, she observed that Mr. Carter was “Below Expectations” in several areas, including classroom management, compliance with District policies and directives, and monitoring student attendance and intervention needs. *Id.* Vice-Principal Evelyn Massiate also evaluated Mr. Carter in April 2009. *See* Ex. B; B4. On her evaluation, she observed that Mr. Carter was “below expectations” in several areas, including following District policies and directives as well as monitoring student attendance and student intervention needs. *Id.* In Mr. Carter’s Summative Appraisal for the 2008-09 school year, he received “Below Expectations” in Domain VII: Compliance with Policies. *See* Ex. B; B5.

10. Ms. Shaw met with Mr. Carter on April 15, 2009 to go over the details of his 2008-09 evaluations and summative appraisal, including the areas in which he received “below expectations” ratings. *See* Ex. B. Ms. Shaw discussed with him the importance of meeting deadlines and turning in lesson plans. *Id.* She specifically asked him what she could do to help him improve and meet his deadlines. *Id.* He told her that the reminders she was already giving were sufficient. *Id.*

11. On or about September 24, 2009, Vice-Principal Massiate reminded Mr. Carter that his students’ progress reports were overdue and that he needed to turn them in to her. *See* Ex. B; B6. Ms. Massiate had verbally reminded Mr. Carter several times to turn in his lesson plans

and grades on time prior to that date. *See* Ex. B. Following that email reminder, on September 25, 2009, Ms. Shaw and Ms. Massiate met with Mr. Carter to remind him that it is part of his job as a teacher to timely submit student grades and progress reports. *See* Ex. B.

12. On October 20, 2009, the fourth grade teachers at Michael Elementary School gave a benchmark test on Reading to their students to assess the students' preparedness to take the state-wide assessment test known as TAKS. *See* Ex. B. On November 10, 2009, the fourth grade teachers gave a benchmark test on Writing to their students. *Id.* Mr. Carter's fourth grade class had a 50% passing rate on the Reading benchmark test and a 39% passing rate on the Writing benchmark test. *See* Ex. B; B7; B8. Mr. Carter was the only fourth grade teacher to have a failing passing rate on the Writing benchmark test, and had the second lowest Reading passing rate. *Id.* Mr. Carter acknowledged that his passing rate needed to be improved. *See* Ex. A1 (Plaintiff's deposition) at 46:16-20.

13. In October 2009, Mr. Carter again failed to turn in completed lesson plans. *See* Ex. B. Vice-Principal Massiate again reminded him of the lesson plan deadlines and asked him to submit his completed plans. *Id.* He still failed to turn in completed lesson plans after the reminder. *Id.* When he did turn in his lesson plans, not only were they late but they were also incomplete. *Id.* Because he failed to turn in timely, completed lesson plans, on October 30, 2009, Vice-Principal Massiate issued a written reprimand to Mr. Carter. *See* Ex. B; B9; Ex. A1 (Plaintiff's deposition) at 43:22-25, 44:1-6. Ms. Massiate then assigned fourth grade team leader, Melissa Ramon, to help remind Mr. Carter of upcoming lesson plan deadlines to assist him in meeting the deadlines. *Id.*; Ex. A1 (Plaintiff's deposition) at 43:22-25, 44:1-6. At his deposition, Mr. Carter admitted that he "was unable to keep up with the paperwork" and that he was "overwhelmed" with "the paperwork and test results and meetings." Ex. A1 at 48:8-13.

14. Mr. Carter, on his own initiative, took a leave of absence after he received the October 30, 2009 reprimand. *See* Ex. B; C; C2; C3. Mr. Carter requested leave on November 4, 2009, and took an extended leave of absence from November 9, 2009 through January 4, 2010. *Id.* His doctor's certification indicated that Plaintiff was experiencing stress at "work and home." *See* Ex. C3.

15. In November 2009, when Mr. Carter began his leave, which was approximately half-way into the nine week grading period, Ms. Shaw discovered that there were very few grades inputted for Mr. Carter's students in Math, Reading, and Language Arts, which were not enough grades to prepare the progress reports that were due to be sent out to parents. *See* Ex. B. Mr. Carter had not entered any grades for Science and Social Studies. *Id.* Additionally, Ms. Massiate and Ms. Shaw discovered a lot of student work left in a tray in his room, which was not graded; so, they graded the work themselves and inputted them in the system. *Id.* However, there was no student work completed for Science and Social Studies. *Id.* As a result, they had to give new assignments to Mr. Carter's students so that the students would have grades for assessment and reporting purposes. *Id.* At that time in the school year, Mr. Carter's students should have had a minimum of two grades per subject per week, so at least eight grades per subject by that time of the year. *Id.* Ms. Shaw was shocked at the lack of students' graded assignments in Mr. Carter's gradebook. *Id.* He had not followed Ms. Shaw's directives to input grades weekly and to have at least two graded assignments per subject per week. *Id.*

16. Additionally, Mr. Carter's classroom was in substantial disorder. *Id.* Of particular concern were several stacks of curriculum work that were found and had apparently never been given to his students in Science and Social Studies. *Id.* As a result, Ms. Shaw asked the other campus Science and Math teachers to assist Mr. Carter's students and give lessons and

assignments to Mr. Carter's students. *Id.* The substitute teacher in Mr. Carter's class during this time also gave assignments, graded them, and entered them into the system. *Id.*

17. Mr. Carter returned to work on or about January 5, 2010. *See* Ex. B; C. Final grades for the nine week grading period were due on January 15, 2010. *See* Ex. B. Ms. Massiate reminded Mr. Carter to input his grades before January 15, 2010. *Id.* Ms. Massiate also reminded at least three other teachers about timely inputting grades, which those teachers did. *Id.* Shortly before the deadline, Ms. Shaw reviewed Mr. Carter's gradebook and again discovered that he had not entered any grades during the period in which he had returned. *Id.* Mr. Carter did not post any grades for the first 1.5 weeks of school in January 2010. *Id.* Ms. Massiate and Ms. Shaw again had to complete his grading and input grades so that report cards could be printed for his students. *Id.*

18. Because Ms. Carter failed to input student grades timely, on January 14, 2010, Ms. Massiate issued a written reprimand to Mr. Carter. *See* Ex. B; B10. When Ms. Massiate and Ms. Shaw met with Mr. Carter to discuss the reprimand, Mr. Carter began crying and stated that he was "not able to get the job done." *See* Ex. B. He also said that "you don't deserve this." *Id.* Ms. Shaw assigned fourth grade team leader, Melissa Ramon, to help Mr. Carter with inputting grades in an effort to help him meet deadlines. *Id.*

19. Mr. Carter, on his own initiative, took a leave of absence following his receipt of the January 14, 2010 reprimand. *See* Ex. B; C. Mr. Carter requested the leave of absence on or about January 15, 2010, which he took through June 7, 2010. *See* Ex. C; C4.

20. While Mr. Carter was on leave, he met with Mr. Mark Hardison, the District Employee Benefits Coordinator, on March 23, 2010. *See* Ex. C. During this meeting, Mr. Carter mentioned that he felt his disability was stress related and that he hoped that when he returned to

work he could be placed in a lower grade level, perhaps second grade. *Id.* He indicated that the reason for his request to teach a lower grade was that he felt that there was too much stress in having to get kids ready for the TAKS test, which is a State accountability test required for third, fourth, and fifth grade students. *Id.* The TAKS test is not required for first and second grade students. *Id.*

21. On or about June 18, 2010, Mr. Carter met with Ms. Shaw, Mr. Hardison and Assistant Superintendent Jim Miller to discuss his request for workplace accommodations. *See* Ex. B; C. At that meeting, Mr. Carter presented to a list of written requests for accommodations. *Id.*; B11; C5. Specifically, Mr. Carter requested (1) a “team plan” with his “grade level to discuss student progress and plan for the coming week,” (2) a reassignment to a different grade level (preferring 3rd, 4th, or 5th grade), (3) permission that his lesson plans be turned in on a Monday instead of a Friday, (4) elimination of weekly meetings with his supervisors, and (5) reassignment to a different campus. *Id.*

22. At that meeting, the District agreed that Mr. Carter would be reassigned to teach first grade, believing it would be less stressful for him since it was not a TAKS testing grade level. *See* Ex. B; C; C6. Mr. Carter had expressed an interest in being assigned to a non-TAKS grade level. *See* Ex. B; C; *see also* Ex. A1 at 69:13-16. Regarding team meetings, the District and Mr. Carter agreed that team meetings, which were already occurring, would continue. *See* Ex. B; C; C6. They also agreed to have Mr. Carter’s grade team leader assist him in completion of his lesson plans, with Mr. Carter’s responsibility being to personalize the lesson plans to reflect any special needs of his students and incorporate his instructional schedule into the plans. *See* Ex. B. Additionally, the District and Mr. Carter agreed to allow Mr. Carter to extend the time to turn in his lesson plans for Tuesday through Friday on the following Monday, but Monday’s lesson plans had to be turned in on Friday. *See* Ex. B. Additionally, the District

suspended the weekly meetings with Ms. Shaw unless he or Ms. Shaw decided he needed additional assistance again. *See* Ex. B. The District denied his request to transfer to another campus. *See* Ex. B.

23. For the 2010-11 school year, Mr. Carter was assigned to teach first grade, since first graders are not required to take the TAKS test like fourth graders. *See* Ex. B. Mr. Carter had previously told Ms. Shaw that the TAKS testing was very stressful for him. *Id.* In his new assignment, Mr. Carter would no longer be required to prepare any written academic portion of the lesson plans for his classroom. *Id.* Rather the first grade teachers met together to plan their lessons, and then the team leader prepared the academic portion of the lesson plans for all first grade teachers. *Id.* Mr. Carter was only required to tailor the lesson plans for information that applied to his particular classroom, i.e. what time his students go to lunch, physical education, music, etc. *Id.* For this reason, Mr. Carter had minimal work to do with the lesson plans once they were provided by the first grade team leader, since the team leader actually prepared all academic portions of the lesson plans. *Id.* He simply needed to cut and paste from the core subject plans drafted by the team and personalize them for his classroom's lesson plans. *Id.* At his deposition, Mr. Carter acknowledged that his lesson plans required only "minimal adjustments" to be completed. *See* Ex. A1 at 95:25, 96:1-8.

24. On or about October 19, 2010, Ms. Shaw checked the first grade teachers' grade books. *See* Ex. B. At that time, she noticed that Mr. Carter had again failed to enter sufficient grades for his students. *Id.* As of October 19, 2010, Mr. Carter had significantly less grades than the other first grade teachers. *Id.* After over six weeks of school, Mr. Carter only had four Language Arts grades, eight Math grades, two Reading grades, two Science grades, and three Social Studies grades inputted. *Id.*; Ex. B13. At that point in the grading period, Mr. Carter should have

had at about twelve grades for the core subjects of Language Arts, Reading, and Math. *See* Ex. B. He was significantly behind in grading. *Id.*

25. On October 20, 2010, Ms. Shaw met with Mr. Carter, along with Vice-Principal Geri Garza. *See* Ex. B. She discussed with him that he again was failing to timely complete his lesson plans. *Id.* In September 2010, Mr. Carter failed to turn in his lesson plans for at least three weeks. *Id.* When he did turn in plans, they were only partially completed. *Id.* Ms. Shaw discussed with him the importance of turning in completed plans, and pointed out to him that his team was completing the core components of the plans for him, that he had very few things he needed to complete on them. *Id.* She also discussed the requirement for him to input more grades. *Id.* Because he was struggling to meet these requirements, Ms. Shaw asked him to meet with her weekly so she could help him meet the deadlines. *Id.* Mr. Carter's lesson plans were often substantially incomplete. *See* Ex. B; B14. For instance, his lessons plans evidenced in Exhibit B14 wholly failed to include any lessons for subjects other than math, which the math specialist had written for him, even though all he had to do was cut and paste from his team's posted lesson plans, since the team wrote plans for the core subjects. *Id.*

26. On November 1 and 2, 2010, Ms. Shaw met with the first grade team and reminded them to enter grades weekly and to have at least two grades per subject per week for each student. *See* Ex. B. She further reminded them about deadlines for turning in lesson plans. *Id.* Mr. Carter was present for that meeting. *See* Ex. B; B15.

27. On November 4, 2010, Vice-Principal Geri Garza conducted a performance appraisal of Mr. Carter. *See* Ex. B; B16. In the appraisal, he received "Below Expectations" ratings in several areas, including student progress, student assessment, and management of student

discipline and instructional strategies. *Id.* Additionally, Mr. Carter accidentally left a student in the restroom when he walked his class to another room. *Id.*

28. On November 8, 2010, Ms. Shaw found that Mr. Carter again had not completed a sufficient number of grades in his gradebook and had not submitted completed lesson plans. *See* Ex. B. She again reminded him to do so. *Id.*

29. On November 10, 2010, two first grade students left Mr. Carter's classroom without permission, unnoticed by Mr. Carter. *See* Ex. B. Ms. Garza and Ms. Shaw spoke with Mr. Carter about the importance of monitoring his students and keeping track of them at all times. *Id.*

30. Mr. Carter's first grade students showed significant lack of progress in their reading levels. *See* Ex. B. Because of this, Ms. Shaw asked the campus reading specialist to assist Mr. Carter in teaching reading. *Id.* Mr. Carter routinely failed to identify students in his classroom who needed additional instruction or specialized instruction in reading. *Id.*

31. Due to Mr. Carter's continued problems in classroom management, on or about December 1, 2010, Ms. Shaw placed him on a Teacher In Need of Assistance ("TINA") Plan to assist him in correcting his deficiencies. *See* Ex. B; B17. It is a common practice to assist struggling teachers by placing them on a TINA plan, with the goal being to pinpoint deficiencies and target ways to help them improve. *See* Ex. B. In his TINA plan, he was directed to post lesson plans timely and input at least two grades per subject per week. *See* Ex. B; B17. He was also directed to work on classroom management of student behavior. *Id.* The TINA provided him with assistance in lesson planning from his first grade team and feedback from a District specialist in classroom management. *Id.*

32. On January 4, 2011, District specialist Ardyce Welch observed Mr. Carter's classroom. *See* Ex. B; B18. In Ms. Welch's observations, she noted that in December Mr. Carter

struggled with classroom behavior management skills and getting the class to pay attention to the lesson. *Id.* She observed that he still struggled with classroom management and expressed concern about the lack of academic progress of his students. *Id.* She indicated that she was concerned that his students would not be prepared for second grade the following year if he did not immediately improve his instructional methods. *Id.*

33. On January 4, 2011, Ms. Shaw issued a written reprimand to Mr. Carter for his repeated failure to input grades. *See* Ex. B; B19. Even after repeated directives to timely input grades, as of January 3, 2011, which was approximately the seventh week of the nine week grading period, Mr. Carter had only inputted eight grades in Math, six in Language Arts, eight in Reading, and three in Science, when he should have had about fourteen grades per core subject at that time. *Id.*

34. Also on January 4, 2011, Ms. Shaw issued a reprimand to Mr. Carter for his failure to timely complete his lesson plans. *See* Ex. B; B20. Several weeks of lesson plans from November and December 2010 were incomplete, where Mr. Carter wholly failed to include reading instruction plans and times that were specific for his classroom, such as library and lab times. *Id.*

35. Mr. Carter soon thereafter took a leave of absence on or about January 13, 2011 and did not return to work the rest of the school year. *See* Ex. B; C. His most recent medical certification indicated that his return date was “indefinite.” *See* Ex. C; C7. Due to Mr. Carter’s persistent performance deficiencies and failure to follow directives, Ms. Shaw recommended to Superintendent John Folks that he recommend to the Board of Trustees to propose Mr. Carter’s contract for nonrenewal. *See* Ex. B. On or about April 5, 2011, Superintendent John Folks recommended that the District’s Board of Trustees propose Mr. Carter’s employment contract for nonrenewal. *See* Ex. B. On or about April 8, 2011, the District sent a letter to Mr. Carter notifying

him of his right to a hearing before the Board of Trustees to consider the proposed nonrenewal. *See* Ex. B; B21.

36. On or about April 21, 2011, Mr. Carter submitted his written resignation, which was accepted in writing by Superintendent Folks. *See* Ex. B; B24; B25.

37. Mr. Carter filed his initial Charge of Discrimination with the EEOC on or about April 26, 2010, alleging disability discrimination, and filed two subsequent amendments alleging retaliation on June 21, 2010 and January 10, 2011. *See* Ex. B; B28; B29; B30.